

JURY TRIAL, REQUIREMENTS FOR — 12-person juries — when required — Revised 12/09

Article 2, § 23 of the Arizona Constitution and A.R.S. § 21-102(A) require a jury of twelve persons whenever the defendant faces the death penalty, or thirty years or more in prison. In determining whether a twelve-person jury is required, the courts "look to the possible cumulative sentences in each case and not just the possible sentence for each count or charge." *State v. Henley*, 141 Ariz. 465, 468, 687 P.2d 1220, 1223 (1984). *Henley* held that failure to empanel a twelve-person jury was fundamental error. However, in *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045 (2009), the court abrogated *Henley* and held that empaneling an eight-person jury was not fundamental error, even though defendant had faced thirty-five years (fifteen years for the offense itself plus twenty if the State had proved additional allegations). Neither party objected at trial. When the State declined to prove aggravating factors at sentencing, defendant was sentenced to ten years. The court concluded that defendant's trial to an eight-person jury removed any risk of receiving a sentence of thirty years or more, so no constitutional error occurred.

If the State becomes aware during a trial with eight jurors that the defendant is entitled to twelve jurors, the prosecution can dismiss charges or withdraw allegations to reduce the defendant's sentencing exposure to less than thirty years. *State v. Cook*, 122 Ariz. 539, 541, 596 P.2d 374, 376 (1979); see also *State v. Kuck*, 212 Ariz. 232, 129 P.3d 954, 955 (App. 2006) (identifying the start of jury deliberations as the crucial point of trial for determining a defendant's sentencing exposure). In *Cook*, after the close of the defendant's case but before the case went to the jury, defense counsel informed the trial court that the defendant was entitled to a twelve-person jury and

moved for a mistrial. The trial court denied that request. Instead the court allowed the State to withdraw an allegation of a prior conviction, thus reducing the defendant's sentencing exposure to less than thirty years. The case was then submitted to the jury, and the defendant was convicted. On appeal he argued that the only appropriate remedy was to declare a mistrial. The Arizona Supreme Court found that no mistrial was required and held that the trial court properly exercised its discretion in allowing the State to withdraw the allegation of prior conviction.

In *State v. Hurley*, 197 Ariz. 400, 4 P.3d 455 (App. 2000), the defendant was charged with manslaughter. Before trial, the State alleged three prior felony convictions. The trial judge asked the parties if a twelve-person jury was required because of the prior conviction allegations and noted that if the State were to withdraw one or more of those allegations, only eight jurors would be required. The prosecutor then moved to dismiss all but one of the allegations and the trial proceeded with eight jurors and two alternates. The defendant was convicted and on appeal argued that the trial judge was biased because the judge effectively gave the State legal advice. The Court of Appeals rejected that argument, noting:

As to the issue of an eight-person jury, the trial court simply recognized the obvious fact that a twelve-person jury was required only if the prosecutor wished to pursue all of the original allegations against defendant. The trial judge made clear at the time of his comments that it was entirely up to the state whether to proceed with the original charges or to dismiss any of the allegations of prior convictions.

Id. at 405, 4 P.3d at 460. The Court of Appeals concluded that the trial judge had not shown any bias.

The Court of Appeals followed *Cook* in *State v. Thorne*, 193 Ariz. 137, 971 P.2d 184 (App. 1997). In *Thorne* the defendant faced over thirty years in prison if he received

consecutive sentences on two counts. However, at a pretrial hearing the State stipulated that the sentences on those two counts would have to be concurrent because the two counts were based on a single act. The defendant received concurrent sentences, the longest of which was ten years. On appeal, he contended that because the maximum sentence could have exceeded thirty years, he was entitled to a twelve-person jury. The Court of Appeals disagreed, noting that the State was bound by its pretrial stipulation, and the trial court followed suit by empanelling an eight-person jury:

[T]he determination of the maximum potential sentence may be made at any time prior to the submission to the jury. Until a case is submitted to the jury, the state may amend the charges in a manner that could reduce the defendant's possible punishment. Therefore, even though defendant's potential maximum sentence was thirty years or more when he was first charged, the potential maximum sentence was reduced in a timely manner, thereby making an eight-person jury appropriate.

Id. at 138, 971 P.2d at 185 (citations omitted).

The trial court deprives a defendant of the right to a twelve-person jury when it declares the defendant will not be sentenced to incarceration in excess of thirty years although such a sentence is authorized by law. *State v. Pope*, 192 Ariz. 119, 121, 961 P.2d 1067, 1069 (App. 1998). In *Pope*, the defendant was charged with offenses that exposed him to a maximum of eighty-one years in prison. Before trial, the State offered to stipulate that any sentences imposed be concurrent and that any sentences imposed must total less than thirty years. The defense objected and suggested that the State dismiss some charges, but the prosecutor declined to do so. The trial court then ruled that eight jurors were sufficient, because regardless of the jury's findings, it would not impose consecutive sentences. The eight-person jury acquitted the defendant on some charges but found him guilty on others. The court imposed concurrent sentences, the

longest of which was six years. On appeal, the defendant argued that he was entitled to twelve jurors. The Court of Appeals agreed, distinguishing *Thorne, supra*:

The judge's assurance that he would not impose a sentence in excess of thirty years in the case before us is not the equivalent of the prosecutor's acknowledgment in *Thorne* that a single act underlies two charges. The judge's assurance was a forfeiture of discretion in order to limit what was authorized; the state's stipulation in *Thorne* was an acknowledgment of fact that established what was authorized. This distinction is not purely technical. In our case, notwithstanding the fact that the Defendant could not be sentenced to more than thirty years because of the judge's assurance, he was nonetheless on trial for a crime that society deems serious enough to carry a penalty in excess of thirty years. In other words, what one judge may think about the circumstances of the crime is not the only consideration that bears on the size of the jury.

Id. at 121, 961 P.2d at 1069. The *Pope* court held that the defendant was entitled to a new trial on the charges for which he was convicted. But the defendant was only entitled to a eight-person jury on retrial since conviction of the new charges would not result in a sentence of more than thirty years. The retrial was necessary, however, to vindicate his constitutional right. *Id.*